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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In re

Amendment of Part 74 of the Commission's Rules  
Governing Use of the Frequencies in the Instructional  
Television Fixed Service

)  
)  
) MM Docket No. 93-106  
)  
)

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**PETITION OF  
THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.  
FOR RECONSIDERATION AND CLARIFICATION**

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## EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCAI") urges the Commission to reconsider and reverse its determination that ITFS programming comporting with Section 74.931(a) of the Rules cannot be applied towards the minimum ITFS programming requirements of Section 74.931(e) unless that programming is viewed at the time of its transmission by students in formal educational programs. In its 1991 *Order on Reconsideration* in General Docket No. 90-54, the Commission afforded ITFS licensees the flexibility to schedule transmissions at any time of the day that would apply against the ITFS substantial use requirements. The transmission of educational, instructional and cultural programming outside of traditional schools hours in order for that programming to be videotaped is a legitimate use of the ITFS. Moreover, by transmitting outside of traditional school hours programming intended to be videotaped, the ITFS licensee can assist the wireless cable operator in making the most efficient use of scarce spectrum and at the same time maximize its own revenue stream. The Commission should restore to ITFS licensees the scheduling flexibility it granted in 1991.

Along similar lines, the Commission should afford ITFS licensees the flexibility envisioned by the industry-wide compromise in scheduling ready recapture airtime. The requirement adopted in the *Report and Order* that licensees preserve simultaneous access to the number of channels for which they are licensed throughout their ready recapture time unduly limits the flexibility of licensees to preserve access during hours where the licensee believes it may have some minimal future need, but will not need access to all of its channels.

To avoid confusion that has been caused by the *Report and Order* and the companion *Order and Further Notice of Proposed Rulemaking* in MM Docket No. 93-24, the Commission should reiterate that programming other than formal educational programming transmitted to students at accredited institutions can be applied towards the substantial use requirement of Section 74.931.

While WCAI has no quarrel with the Commission's decision to equate the use of channel mapping technology with channel loading under certain circumstances, there are numerous ways in which channel mapping technology can be applied by ITFS licensees that do not implicate the same policy concerns as channel loading. Since the *sine qua non* of channel loading is that the licensee never employs all of its channels simultaneously, the Commission should make clear that an ITFS licensee that does utilize all of its channels simultaneously at some time during the week is not subject to the new restrictions on channel loading.

Finally, the Commission should make the editorial amendments to newly-adopted Section 74.931(e)(9) necessary to clarify that ITFS licensees need not preserve more than forty hours per week per channel for their immediate use and/or ready recapture.

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THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.  
FOR RECONSIDERATION AND CLARIFICATION**

The Wireless Cable Association International, Inc. ("WCAI"),<sup>1/</sup> by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider and clarify certain of the rules and policies adopted in the *Report and Order* in the captioned proceeding.<sup>2/</sup>

**I. INTRODUCTION**

While WCAI believes that reconsideration and clarification of portions of the *Report and Order* is essential, it has no quarrel with the Commission's underlying goal -- providing

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<sup>1/</sup>WCAI is the trade association of the wireless cable industry. Its members include licensees in the Multipoint Distribution Service ("MDS") and the Instructional Television Fixed Service ("ITFS"), the operators of virtually every wireless cable system in the United States, program vendors and equipment manufacturers. Its Board of Directors consists of, among others, representatives of several educational organizations. WCAI was an active participant throughout this proceeding and was the primary representative of the wireless cable industry in the negotiations that led to the industry-wide agreement that was presented to the Commission last year. Thus, WCAI's standing to petition for reconsideration of the *Report and Order* in this docket is patent.

<sup>2/</sup>*Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, FCC 94-147, MM Docket No. 93-106 (rel. July 6, 1994). A summary of the *Report and Order* was published in the *Federal Register* on July 13, 1994 and thus this petition is timely filed pursuant to Section 1.429(d) of the Rules. See 59 Fed. Reg. 35,635 (July 13, 1994).

“ITFS licensees with a less costly, more reliable method for satisfying [the Commission’s] educational requirements . . . while allowing them flexibility to cultivate their partnerships with wireless cable operators, an arrangement we have sought to nurture over the last decade, to the welfare of the ITFS service and the public.”<sup>3/</sup>

History has shown that when the Commission has afforded ITFS licensees appropriate flexibility in crafting excess capacity leasing arrangements with wireless cable operators, both the ITFS and the wireless cable industry have thrived to the benefit of all concerned. Particularly since the Commission’s 1991 decision in General Docket No. 90-54 to liberalize the rules restricting the leasing of excess capacity by ITFS licensees,<sup>4/</sup> the ITFS has flourished. The rules adopted in 1991 permitted ITFS licensees in a given market to schedule their time in such a way that additional virtual full time channels created through the application of channel mapping technology could be made available for lease to the wireless cable operator without reducing the amount of educational, instructional and cultural programming being transmitted. The result has been to make wireless cable commercially viable in markets where such was not previously the case (resulting in the construction of ITFS facilities in markets that previously had none), and to expand subscriber interest in wireless cable, increasing the lease fees paid to lessors of excess ITFS capacity.

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<sup>3/</sup>*Report and Order*, at ¶ 14.

<sup>4/</sup>*See Amendment of Parts 21, 43, 74, 78, and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 FCC Rcd 6764, 6776 (1991)[hereinafter cited as “*Gen. Docket No. 90-54 Order on Reconsideration*”].

That the ITFS has blossomed thanks to wireless cable should come as no surprise to the Commission, which has recently “acknowledge[d] the role the wireless cable industry has played in reinvigorating the ITFS service.”<sup>5/</sup> Indeed, as the *Report and Order* correctly concludes:

Before the Commission permitted leasing of excess capacity, the spectrum initially allotted for ITFS was so underutilized outside metropolitan areas that the Commission reallocated two entire ITFS channel groups, or eight channels, to MMDS. With the advent of leasing, demand for ITFS channels has surged. Leasing has prompted revenue-sharing arrangements between ITFS licensees and wireless cable operators resulting not only in full use of the spectrum, but in full realization by educators of what was once only an unattainable aspiration: to become actively engaged in a technology that exposes their students to educational and interactive instructional programming previously inaccessible to them.<sup>6/</sup>

As the Commission is well aware, “revenues are key to this ITFS-MMDS partnership.”<sup>7/</sup> The Commission is absolutely right when it observes that “leasing channel capacity for the transmission of commercial programming generates revenues that may be vital to the continuing operations of authorized ITFS systems, to the successful deployment in many markets of ITFS service, and to the service’s public interest benefits.”<sup>8/</sup> In crafting rules to govern the relationship between ITFS licensees and wireless cable operators, the

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<sup>5/</sup>*Amendment of Part 74 of the Commission’s Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 8 FCC Rcd 2828, 2832 (1993).

<sup>6/</sup>*Report and Order*, at ¶ 13 (citations and footnotes omitted).

<sup>7/</sup>*Id.*

<sup>8/</sup>*Id.*

Commission cannot lose sight of the fact that a wireless operator's ability to provide revenue to its ITFS partners is directly related to its ability to compete with the entrenched cable monopoly. As the *Report and Order* acknowledges, "wireless cable operators endeavoring to compete with wired cable systems, whose number of channels often exceeds 50, must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market."<sup>2/</sup> Commission decisions (like the *Report and Order*) that effectively reduce the number of channels available to the wireless cable operator will inevitably reduce the revenue flow that has revitalized the ITFS of late.

Throughout this proceeding, WCAI has advocated the adoption of rules and policies that would further the flexibility the Commission has afforded ITFS licensees and wireless cable operators in crafting their relationships, while retaining appropriate restrictions to assure that local educational, instructional and cultural needs are met. Adoption of the industry-wide compromise to which WCAI was a party would have accomplished those goals. Where WCAI parts company with the *Report and Order* is over new restrictions that were not contemplated by the industry-wide compromise but are nonetheless being placed upon ITFS licensees that elect to lease excess capacity to wireless cable operators in a manner that permits channel mapping or channel loading. Simply put, those restrictions will make it virtually impossible to utilize channel loading, and will substantially reduce the number of channels that ITFS licensees who utilize channel mapping technology can make available to

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<sup>2/</sup>*Id.*, at ¶ 14.



wireless cable operators. Presumably, that was not the Commission's intention, but it is most certainly the result.

To rectify the *Report and Order*, WCAI calls upon the Commission (i) to reinstate its former policy of applying towards the so-called "substantial use" minimum ITFS programming requirements of Section 74.931(e) all educational, instructional and cultural programming transmitted by ITFS licensees to be videotaped for subsequent viewing by students; (ii) to afford ITFS licensees greater flexibility in the scheduling of ready recapture time; and (iii) to clarify that educational, instructional and cultural programming other than formal educational programming transmitted for viewing by students at accredited institutions can continue to be applied towards the substantial use requirement. In addition, certain minor revisions are necessary to avoid confusion regarding the rules and policies promulgated in the *Report and Order*.<sup>10/</sup>

## II. DISCUSSION.

*A. By Reversing Its Prior Policy Permitting ITFS Programming Transmitted To Be Taped And Subsequently Viewed By Students, The Commission Has Burdened ITFS Licensees And Wireless Cable Operators Without Concomitant Benefit To The Public.*

In a petition for reconsideration filed last week, Alliance for Higher Education, Arizona Board of Regents for Benefit of the University of Arizona, South Carolina Educational

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<sup>10/</sup>As set forth in Sections II.D and II.E, the Commission should (i) clarify that the rules and policies applicable to ITFS licensees engaged in channel mapping only apply in those cases where the licensee has not reserved the ability to simultaneously utilize all of its channels; and (ii) amend newly-revised Section 74.931(e)(9) to clarify that the total amount of airtime used by an ITFS licensee and/or subject to ready recapture need not exceed 40 hours per channel.

Television Commission, State of Wisconsin - Educational Communications Board, and University of Maine System (collectively, the "Educators") identified the single greatest flaw in the *Report and Order* -- the adoption of a new policy that educational programming transmitted outside of traditional school hours with the intent that it be videotaped and later viewed by students cannot be applied towards the substantial use requirements of Section 74.931.<sup>11/</sup> WCAI wholeheartedly supports the Educators' call for repeal of this new policy, which will have an apparently unintended, but no less devastating, impact on the wireless cable industry if permitted to stand.

In the *Report and Order*, the Commission has correctly concluded that:

In today's market environment, MMDS channels and ITFS channels are interrelated components of an integrated set of channels used to provide nonbroadcast instructional and entertainment programming in a given market. To maximize the usefulness of this network to both MMDS and ITFS licensees, the latter should account for four channels in this network.<sup>12/</sup>

Under existing excess capacity lease agreements, it is not unusual for the wireless cable operator to secure, through application of channel mapping technology to the 20 ITFS channels, the ability to provide subscribers with the appearance that as many as 15 or 16 channels are available for full time commercial use. If the policy regarding videotaping adopted in the *Report and Order* stands, virtually every ITFS licensee will be required to use

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<sup>11/</sup>See Petition of Alliance for Higher Education, *et al* for Reconsideration, MM Docket No. 93-106 (filed Aug. 5, 1994)[hereinafter cited as "Educators' Petition for Reconsideration"].

<sup>12/</sup>*Report and Order*, at ¶ 14.

two or more channels simultaneously during school hours in order to meet its substantial use programming requirement. As a result, far fewer channels will be available to the wireless cable operator -- the same wireless cable operator the Commission concedes "must have access to as many of the available 32 or 33 ITFS and MMDS channels as possible in a given market."<sup>13/</sup> While a reduction in channel capacity available to the wireless cable operator could arguably serve the public interest if it significantly advanced educational objectives, the Educators have demonstrated that such is not the case here.

Although nowhere mentioned in the *Report and Order*, the decision regarding videotaping effectively reverses a ruling made by the Commission less than three years ago in its *Order on Reconsideration* in General Docket No. 90-54 that afforded ITFS licensees much needed flexibility in the scheduling of ITFS programming. In its *Order on Reconsideration*, the Commission repealed its former requirement that only programming transmitted between 8:00 am and 10:00 pm, Monday through Saturday, could be applied towards the substantial use requirements of Section 74.931 and permitted educational, instructional or cultural programming transmitted by an ITFS licensee at any time to be counted towards the substantial use minimums.<sup>14/</sup> The record before the Commission at that time established, beyond peradventure, that the use of videotaped materials is a legitimate

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<sup>13/</sup>*Id.*

<sup>14/</sup>*See Gen. Docket No. 90-54 Order on Reconsideration*, 6 FCC Rcd at 6774.

educational tool in the classroom, as well as an effective mechanism for distributing educational programming to students engaged in distance learning programs.<sup>15/</sup>

Significantly, there is nothing in the record of this proceeding to the contrary. In the early years of ITFS, the Commission's predisposition against programming transmitted outside of traditional school hours was understandable. At the time, VCRs were expensive devices beyond the reach of most schools, and off hour ITFS transmissions were properly viewed by the Commission as suspect. By 1991, however, VCRs had become as omnipresent in the classroom as the chalkboard and the time had come for the Commission to recognize that even educational programming transmitted in the dead of night could play a legitimate role. A Yankelovich Group study found that by 1991, the video cassette recorder had become a ubiquitous presence in the classroom.<sup>16/</sup> In a telephone survey of fifth grade through eighth grade teachers, Yankelovich discovered that 95% had access to a VCR in school and that 71% used that VCR at least once a week. Indeed, by 1991 more teachers were utilizing the VCR once a week in the classroom than used educational programming transmitted in real time. It is evident that:

No longer do teachers turn off the lights and let the TV do the work. Today they tape and preview programs, prepare multi-skill learning activities, stop tapes for discussion, and follow up

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<sup>15/</sup>See, e.g. Joint Comments of Diocese of Orange and Diocese of San Bernardino, Gen. Docket No. 90-54, at 17-18 (filed May 7, 1990); Petition of Wireless Cable Ass'n for Clarification and Partial Reconsideration, Gen. Docket No. 90-54, at 16-19 (filed Dec. 3, 1990).

<sup>16/</sup>See "Nickelodeon Plans Ad-Free Blocks for Classroom Use," *Cable World*, at 72 (Sept. 17, 1990); Cable Education Notes, *Communications Daily*, at 10 (Sept. 19, 1990).

the videos with projects, quizzes, and debates. The *active* use of television offers far greater rewards than the old way . . .<sup>17/</sup>

As the Educators have established, there are a variety of reasons why educators prefer to employ videotaped programming in the classroom and why the ITFS is an appropriate means for distributing programming to receive sites.<sup>18/</sup> In the interest of brevity that discussion need not be repeated here. The Commission should note, in addition, that since the late 1980s our nation's educators have realized myriad benefits through access to satellite-distributed educational programming being provided by networks such as The Learning Channel, Discovery Channel, The Weather Channel, C-SPAN, Mind Extension University and Cable News Network.<sup>19/</sup> Largely because satellite and other transmission costs are lower during non-prime hours and the pressure for building audiences (and ratings) is non-existent, many satellite distributors of educational programming are relaying educational programming during non-prime time -- programming that readily can be retransmitted via ITFS for recording at local schools and other ITFS receive sites.<sup>20/</sup> Those programmers have secured the copyright releases necessary for videotaping and make available to educators a wide array

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<sup>17/</sup>Arden, Partners in Education, *Cable in the Classroom*, at 15 (June 1993).

<sup>18/</sup>Educators' Petition for Reconsideration, at 3-4.

<sup>19/</sup>"Cable Carves Niche as a Classroom Tool," *Broadcasting*, at 33 (Aug. 26, 1991).

<sup>20/</sup>Attached as Exhibit A is an article from the June 1994 issue of *Cable in the Classroom* illustrating the benefits a videotape library has brought to a rural Alabama high school. Exhibit B is a guide from the same publication instructing educators in the proper use of videotaped material in classrooms.

of classroom support material.<sup>21/</sup> Mind Extension University, for example, transmits an extensive amount of telecourse material outside of traditional school hours. Every Tuesday between 4-5:00 am eastern time, The Learning Channel transmits a series of 5 to 15 minute segments for K-6 students focusing on math, social studies, science or language arts to be videotaped and replayed in the classroom. CNN's 15 minute classroom-oriented news programming is transmitted at 3:45 am eastern time each day.<sup>22/</sup> The Weather Classroom program is transmitted each day for 15 minutes starting at 4:00 pm eastern time, providing a variety of educational materials on weather-related topics.<sup>23/</sup> C-SPAN utilizes non-prime hours to replay Congressional hearings and other events of interest that could not be accommodated in real time, and actively promotes the taping of these off-hours transmissions for subsequent classroom use.<sup>24/</sup> All told, programmers to the wireless cable industries have been spending in excess of \$12 million a year on acquiring or developing more than 150 hours per week of commercial-free educational programming with liberal copyright clearances that allow programs to be taped and used later. As Gary Marx, the associate executive

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<sup>21/</sup>For example, attached as Exhibit C is the study guide distributed to educators by The Learning Channel in support of "Your Vote," a 30-minute program designed for videotaping and subsequent use in high schools and colleges.

<sup>22/</sup>Attached as Exhibit D is a recent article illustrating how videotapes of CNN Newsroom are utilized in a classroom.

<sup>23/</sup>Exhibit E is an article demonstrating the use of the Weather Classroom in a Macon County, Georgia middle school.

<sup>24/</sup>Exhibit F is a recent article illustrating how videotaped C-SPAN programming, coupled with C-SPAN's teacher guides, are utilized in the classroom.

director of the American Association of Schools Administrators, has stated, these services are "in many cases a godsend" to the schools that receive them.<sup>25/</sup>

The central question posed by the Educators is a rather simple one -- will the Commission afford local educators the flexibility to program ITFS facilities both to meet their local educational goals and to maximize the benefits of partnerships with wireless cable? While most ITFS licensees will no doubt want to retain transmission time during traditional school hours for programming that is best viewed in real time (such as interactive programming), WCAI submits that the Commission can best serve educators, wireless cable operators and the public by returning to local educators the flexibility they were first afforded in 1991 to meet their substantial use requirement at whatever hours best accomplish local educational objectives.<sup>26/</sup>

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<sup>25/</sup>"Cable Carves Niche as a Classroom Tool," *Broadcasting*, at 33 (Aug. 26, 1991).

<sup>26/</sup>As Rocky Mountain Corporation for Public Broadcasting once stated in urging the Commission to afford increased flexibility in the crafting of excess capacity leases:

Not only could MDS channel capacity be increased by increased access to ITFS excess capacity through less restrictive and inhibiting lease limitations but that additional ITFS channels might well be activated by educational institutions providing yet more excess capacity for MDS use and making greater utilization of the technology for education possible. These added channels would enhance licensee flexibility in responding to changing needs and opportunities and in mutually beneficial arrangements with MDS operators.

Comments of Rocky Mountain Corp. for Public B'casting, Gen. Docket No. 90-54, at 4 (filed April 23, 1990).

*B. ITFS Licensees Should Be Afforded Greater Flexibility In The Scheduling Of Ready Recapture Time.*

Consistent with the philosophy that ITFS licensees should be afforded the greatest amount of flexibility possible in the scheduling of their airtime without jeopardizing their educational and instructional objectives, WCAI believes the Commission should reconsider and reverse its requirement that each ITFS licensee engaged in channel mapping or channel loading preserve the ability to transmit all of its ready recapture time on the number of channels for which it holds a license simultaneously.<sup>27/</sup>

Under the terms of the industry-wide compromise, the Commission was "to mandate that each ITFS licensee engaged in channel loading maintain the right to use or recapture some simultaneous use of airtime on the number of channels for which it is licensed."<sup>28/</sup> As evidenced by its participation in the industry-wide compromise, WCAI has no quarrel with the proposition that an ITFS licensee should be required to use or have the right to ready recapture simultaneous use of the number of channels for which it is licensed. Indeed, in the discussions leading to the industry-wide compromise, WCAI had initially suggested that ITFS licensees be required to preserve a minimum of five hours per week per channel for

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<sup>27/</sup>As discussed in Section II.E, the Commission should clarify that ITFS licensees that utilize more than 20 hours per channel are not required to reserve for ready recapture a full 20 hours per channel. For convenience sake, however, WCAI will in this section assume that each ITFS licensee must reserve for ready recapture 20 hours per channel per week.

<sup>28/</sup>See Reply Comments of Wireless Cable Ass'n Int'l, MM Docket No. 93-106, at 7 (filed Aug. 19, 1993)(emphasis added).



simultaneous recapture.<sup>29/</sup> However, WCAI relented to concerns expressed by educators that the specification of any particular amount of time would be contrary to the best interests of the ITFS community. As a result, the parties to the compromise intentionally avoided specifying any particular amount of airtime that would have to be available for simultaneous use, in much the same fashion that the Commission has never previously specified how much simultaneous use is necessary to demonstrate a need for multiple channels or how much formal educational programming an ITFS is required to transmit in order to satisfy the essential use requirement.

In WCAI's view, the fundamental problem with the Commission's approach is that it forces an ITFS licensee to sacrifice its ability to spread its ready recapture time as it sees fit. Because airtime on a wireless cable system is a scarce commodity, ITFS licensees and wireless cable system operators go to great lengths to schedule the 80 hours of ready recapture time available to a four channel licensee wisely.<sup>30/</sup> The new requirement that all ready recapture time be scheduled for simultaneous access undercuts their ability to craft efficient schedules. For example, a local school district holding an ITFS license for four

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<sup>29/</sup>WCAI recognizes that its five hour proposal was somewhat arbitrary. In WCAI's view, however, its proposal balanced between the need to provide ITFS licensees with flexibility in the scheduling of airtime and the goal of assuring that a licensee securing a license for multiple channels actually has reasonable need for multiple channels.

<sup>30/</sup>In crafting ready recapture schedules, the educator attempts to make an estimation of its future needs. The wireless cable operator's objective is to maximize coordination among the various ITFS licensees' schedules in a market, so that the ITFS licensees, as a group, cannot recapture too many channels simultaneously and thereby cripple the operator's ability to provide subscribers with the critical mass of commercial full time channels necessary to survive in the marketplace.

channels with no immediate need for Saturday airtime may to preserve substantial evening airtime for adult education programming, but also desire to preserve the right to recapture three morning hours on one channel on Saturday on the off chance it may have some future need. Under the Commission's new rule, that ITFS licensee could not do so. Rather, it would have to preserve simultaneous access to four channels on Saturday morning. Simply put, in order to preserve three hours, the school district would have to expend 12 of its 80 ready recapture hours, nine of which it would prefer to have available weekday evening.

The *Report and Order* is silent as to why the Commission has required all ready recapture time to be scheduled to provide for simultaneous access. WCAI can only speculate as to the Commission's rationale for moving from the prior regulatory regime (under which the Commission avoided specifying any particular amount of simultaneous access an ITFS licensee must preserve) to one in which all ready recapture time must be simultaneously scheduled. Nonetheless, as the preceding example illustrates, the new approach does not serve the best interests of ITFS licensees. Therefore, WCAI urges the Commission to modify Section 74.931(e)(9) to require only that each ITFS licensee preserve some simultaneous ready recapture access to the number of channels for which it is licensed.

*C. The Commission Should Reiterate That Programming Other Than Formal Educational Programming Transmitted To Students At Accredited Institutions Can Be Applied Towards The Substantial Use Requirement.*

The Commission's policy reversal on videotaping represents the most glaring, but not the only, instance in which the *Report and Order* and the companion *Order and Further*

*Notice of Proposed Rulemaking* ("Order and FNPRM") in MM Docket No. 93-148<sup>31/</sup> suggest a subtle shift away from the Commission's unqualified support for the use of ITFS to transmit educational, instructional and cultural programming that is not formal educational programming intended for real time viewing by students at accredited institutions. If a shift is taking place, WCAI would find it most troubling, for it would fly in the face of the ever-increasing demand by educators for facilities that can meet local educational, instructional and cultural needs other than those satisfied in a traditional classroom setting.

The Commission has long held that the "primary purpose" of ITFS facilities is for the transmission of formal educational programming to students enrolled in accredited institutions,<sup>32/</sup> and has historically required that "every channel requested must contain at least some amount of essential use [*i.e.* formal educational] programming."<sup>33/</sup> By 1984, however, the Commission acknowledged that "the need and demand for the dissemination of programming of an educational, instructional, cultural and information nature, for other than classroom purposes, will continue to expand into offices, industry, hospitals, training and

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<sup>31/</sup> *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, FCC 94-14, MM Docket No. 93-24 (rel. July 6, 1994).

<sup>32/</sup> See, e.g. *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 98 F.C.C.2d 1249, 1251 (1984)[hereinafter cited as "*MM Docket No. 83-523 FNPRM*"].

<sup>33/</sup> *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 101 F.C.C.2d 50, 82 (1985)[hereinafter cited as "*MM Docket No. 83-523 SR&O*"].

cultural centers and the individual home, and that this is not only inevitable, but desirable."<sup>34/</sup>

As a result, the Commission has refused to establish any specific amount of formal educational programming that an ITFS licensee must transmit to classrooms before it can engage in leasing. Rather, the Commission decided that:

Specific quantification is neither practical nor necessary. The Commission is loathe to substitute its judgement for that of educators. . . . The essential use rule already requires all licensees, including lessors, to deliver at least some formal education on each channel. This will necessitate the installation of receive equipment or appropriate administration, so that essential uses will not suffer from extrinsic considerations related to delivery costs. Beyond that, *licensees must be permitted to use their discretion in responding to individual needs. Therefore, all ITFS programming, formal and informal, will count towards the substantial use minimum.*"<sup>35/</sup>

The Commission's 1984 prediction of a sea change in the nature of the demand for educational, instructional and cultural programming has proven prescient. As former Commissioner and current President of the Public Broadcasting Service Ervin S. Duggan observed just last week, "Educational TV has come a long way since a single camera was trained on Mrs. Gundy holding a pointer at the blackboard."<sup>36/</sup> Wireless cable operators have found that many educators become interested in serving as ITFS licensees primarily because the ITFS is an efficient vehicle for meeting local educational, instructional and cultural needs that cannot be satisfied in traditional classroom settings. Against this backdrop, the *Report*

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<sup>34/</sup>MM Docket No. 83-523 FNPRM, 98 F.C.C.2d at 1252.

<sup>35/</sup>MM Docket No. 83-523 SR&O, 101 F.C.C.2d at 82, 87 (emphasis added).

<sup>36/</sup>Edwards, "PBS Launches Couch College," *Washington Post*, at C1 (Aug. 4, 1994).

*and Order* and the *Order and FNPRM* have caused some degree of confusion among ITFS and wireless cable interests regarding the nature of programming that can be applied against the ITFS substantial use requirement of Section 74.931(e).

The confusion can be traced primarily to newly promulgated Section 74.902(d)(2) of the Rules, which provides, in pertinent part, that an ITFS licensee engaged in channel loading or channel mapping must propose “to transmit some formal educational programming, as defined in Section 74.931(a), and to transmit the requisite minimum programming of Section 74.931(e) for genuinely educational purposes and to receive sites when students are there.” ITFS licensees and wireless cable operators have questioned whether the underscored phrase may somehow qualify Section 74.931(a)(2), which (when read in conjunction with Section 74.931(e)), permits an ITFS licensee to apply against its substantial use minimum all “educational, instructional and cultural material [transmitted] to selected receiving locations, including in-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors.”<sup>37/</sup> Those concerns have been exacerbated by Paragraph 20 of the *Report and Order* (which provides that “ITFS licensees must undertake the obligation of insuring that their recapture-time programming, if it is to be transmitted over channels other than their own, actually

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<sup>37/</sup>Two specific concerns have been raised: (i) whether the “genuinely educational purposes” test requires programming different from programming meeting the definition set forth in Section 74.931(a)(2) and quoted above; and (ii) whether the use of the term “students” effectively excludes programming intended solely for viewing by those not enrolled in formal educational courses.

reaches their students”)<sup>38/</sup> and those portions of the *Order and FNPRM* in which the Commission questions the *bona fides* of programming transmitted to receive sites which are not accredited.<sup>39/</sup>

Based on informal discussions with the staff since release of the *Report and Order*, WCAI understands that it is not the Commission’s intention either to impose new restrictions on the type of programming that can be applied towards the substantial use requirement, or to require that all such programming be viewed at accredited receive sites. To eliminate the uncertainty that has arisen and avoid future confusion, WCAI urges the Commission to reiterate that ITFS programming satisfying the standard of Section 74.902(d)(2) can continue to be applied against the substantial use minimum requirement of Section 74.931(e), regardless of where it is viewed.

*D. The Commission’s New Restrictions On Channel Mapping Should Only Apply To ITFS Licensees That Do Not Utilize All Of Their Channels Simultaneously.*

One of the most significant elements of the *Report and Order* is the Commission’s decision to impose the same restrictive regulatory scheme on an ITFS licensee that employs channel mapping technology as the Commission has adopted for those ITFS licensees that schedule their airtime to permit channel loading. The Commission’s decision to impose new restrictions on ITFS licensees employing channel mapping technology can be traced to the Commission’s conclusion that channel mapping and channel loading are functionally

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<sup>38/</sup>*Report and Order*, at ¶ 20 (emphasis added).

<sup>39/</sup>*See Order and FNPRM*, at ¶¶ 39-40.

equivalent.<sup>40/</sup> That belief is certainly correct when an ITFS licensee schedules its time so that it never makes simultaneous use of all of its channels, which is precisely the situation described by the Commission in Footnote 9 of the *Report and Order* as illustrative of channel mapping. WCAI does not object to the Commission's approach where an ITFS licensee employing channel mapping schedules its airtime in a manner that is functionally equivalent to channel loading (*i.e.* so that all channels are never used simultaneously).

However, the approach to channel mapping technology adopted in the *Report and Order* is over-broad, as it fails to acknowledge that channel mapping technology can also be employed in a variety of situations that are quite dissimilar to channel loading and do not implicate the same policy concerns. The Commission should therefore clarify that its new restrictions on channel mapping only apply to ITFS licensees that never utilize all of their channels simultaneously for the transmission of educational, instructional or cultural programming.

As utilized in the cable and wireless cable industries, the term "channel mapping" applies to the technique by which a system operator dynamically designates the output channel for programming transmitted over a given frequency. Channel mapping can be utilized in the following ways, all of which involve ITFS licensees that make simultaneous use of their channels:

- Assume: (i) the A Group channels in a given market are licensed to a local school district, which utilizes all of the airtime on all four channels from 9 am to 4 pm, Monday through Friday; (b) that the B Group channels are licensed

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<sup>40/</sup>See *Report and Order*, at ¶ 16.

to a university, which utilizes all four channels from 4 pm to 10 pm, Monday through Friday, to transmit graduate courses to distance-learning receive sites; and (c) that the remaining time on all eight of these channels is leased to a wireless cable operator. Channel mapping technology can be applied to these eight channels so that wireless cable subscribers would perceive that four full time commercial channels are available at all times and that four commercial channels are available part time, while the four channels on which educational programming is displayed to students would only have educational programming on them. To accomplish this, whichever of the A Group or the B Group is transmitting educational programming at a given time would be mapped to channels 50 through 53, which would be reserved solely for the display of ITFS programming. Channels 54 through 57 would display the commercial programming transmitted by the wireless cable operator over the A Group channels other than from 9 am to 4 pm. From 9 am to 4 pm, the output of the B Group channels would be mapped to display on channels 54 through 57, while the output of the A Group channels was shifted to channels 50 through 53. As a result, channels 54 through 57 would be being utilized full time to display commercial programming. The remaining hours available on the B Group to the wireless cable operator would be mapped to channels 58 through 61, which would appear to wireless cable subscribers as part-time commercial channels.

- Assume that the C Group ITFS channels in a given market are licensed to a local school district, which utilizes each of four channels during the day partially for teacher training and administration, and partially for the transmission of educational programming. That school district can utilize channel mapping to segregate its teacher training and administration programming for viewing on channels 71 through 74, while its student-oriented programming is mapped to channels 67 through 70. In this manner, students can be prevented from viewing programming material intended for teachers and administrators.
- Assume the G Group ITFS licensee in a market utilizes all four of its channels during the daytime hours, and leases excess capacity during the evening to the wireless cable operator for a pay-per-view service. The operator can transmit its videotext pay-per-view program schedule on channel G1 and have that videotext schedule displayed when the set-top box is tuned to channel 70. The pay-per-view movies or special events can be transmitted on channels G2, G3 and G4 in scrambled mode. When a subscriber orders a particular movie, a signal would be sent to his or her set-top box to channel map the appropriate incoming channel (G2, G3 or G4) to channel 70 and to descramble that



channel. In this fashion, the subscriber ordering a pay-per-view event is not required to change channels after he or she places an order. Rather, the subscriber's pay-per-view selection is displayed on the same channel where the videotext schedule had initially appeared.

Clearly, there are situations where ITFS signals will be channel mapped, without implicating the policy concerns that have led the Commission to impose more stringent regulation on the licensees that channel load. Since the *sine qua non* of channel loading is that the licensee never employs all of its channels simultaneously, the Commission should make clear that an ITFS licensee that does utilize all of its channels simultaneously at some time during the week is not subject to the new restrictions on channel loading.

*E. The Commission Should Amend Section 74.931(e)(9) To Clarify That ITFS Licensees Need Not Preserve More Than Forty Hours Per Week Per Channel For Their Immediate Use And/Or Ready Recapture.*

Finally, the Commission should amend newly-adopted Section 74.931(e)(9) of its Rules to more accurately reflect the Commission's policies with regard to ready recapture time and eliminate the potential for confusion in the future. WCAI fears that, as currently drafted, Section 74.931(e)(9) could be interpreted to require ITFS licensees to preserve more than 40 hours per week per channel for the transmission of ITFS programming, a result unintended by the *Report and Order*.

Historically, the Commission has required ITFS licensees engaged in leasing of excess capacity to preserve at least 40 hours each week per channel for the transmission of ITFS programming. This 40-hour preservation could consist of any combination of airtime actually used to transmit ITFS programming and airtime subject to ready recapture, provided that the